STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 2, 2003
v	No. 239035 Kent Circuit Court
MARK ALLEN STURGIS, Defendant-Appellant.	LC No. 01-006543-FH

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of unarmed robbery, MCL 750.530, entered after a jury trial. We remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant alleged that he was assaulted and robbed after he gave a ride to two men he met at the home of a friend. Complainant viewed a photo array and identified defendant as the person who assaulted and robbed him. Helen Clark, complainant's friend, testified that she saw complainant, defendant, and another man outside her home on the day of the incident. Complainant denied seeing Clark on the day of the incident. Detective Fannon testified that complainant identified defendant from a photo array. In response to a question regarding the date on which the photograph of defendant was taken, Fannon indicated that the photograph had a 2001 booking number. No further reference was made to the booking number on the photograph. Fannon stated that in his experience victims with head injuries commonly give inconsistent statements.

After instructing the jury, the trial court excused the alternate juror, and the remaining jurors retired to deliberate. The jury found defendant guilty as charged. The trial court polled the jury at defendant's request. Thirteen jurors responded, and each agreed that the verdict was guilty. Defendant did not object to the fact that thirteen jurors responded in the poll.

The trial court sentenced defendant to five to fifteen years in prison for unarmed robbery, to be served consecutively to the sentence he was serving on parole at the time of the offense. The minimum term was within the applicable statutory sentencing guidelines.

We review a trial court's determination of an evidentiary issue for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions, US Const, Am VI; Const 1963, art 1, § 20. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. *Id.* at 600. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *Rockey, supra* at 76.

Defendant argues that Fannon's testimony regarding the booking number on the photograph was not properly introduced under MRE 404(b)(1) or MRE 609, and that the testimony regarding the tendency of head injury victims to give inconsistent statements was beyond the scope of lay opinion testimony allowed by MRE 701. Defendant contends that admission of this testimony constituted plain error; in the alternative, he asserts that counsel's failure to object to the testimony constituted ineffective assistance.

We disagree. Defendant did not object to Fannon's testimony; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Fannon's testimony regarding the booking number on the photograph was brief and made no reference to any prior arrest. His testimony regarding victims with head injuries was based on his experience and his own observations. Counsel's decision to refrain from objecting to Fannon's testimony and thereby calling further attention to it constituted trial strategy. We do not substitute our judgment for that of counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Complainant gave direct testimony in which he identified defendant as the person who assaulted and robbed him. The jury was entitled to accept complainant's testimony as credible, notwithstanding the fact that the evidence showed that complainant made inconsistent statements about various aspects of the incident. *People v Marji*, 180 Mich App 525, 542; 447 NW2d 835 (1989). No plain error occurred. Defendant has not established that he was prejudiced by counsel's failure to object to Fannon's testimony in that he has not shown that but for counsel's error, it is reasonably probable that the result of the proceedings would have been different.

Defendant argues that he was denied his right to have a twelve-person jury render a verdict in this case, Const 1963, art 1, § 14, because thirteen jurors deliberated and rendered a verdict. He asserts that the irregularity constituted plain error, and that trial counsel rendered ineffective assistance by failing to object.

The record indicates that the trial court dismissed the thirteenth juror before deliberations commenced. The jury found defendant guilty as charged. The trial court polled the jury at defendant's request. Thirteen jurors responded, and each agreed that the verdict was guilty. Defendant did not object to the fact that thirteen jurors responded to the poll. Neither the parties nor the trial court observed the apparent error.

It is impossible for us to determine from the record whether thirteen jurors actually and actively deliberated in the jury room before reaching a unanimous verdict. In *People v Sizemore*, 69 Mich App 672, 679; 245 NW2d 159 (1976), this Court faced a similar situation and remanded

for a hearing to determine whether thirteen jurors actually rendered a verdict. The *Sizemore* panel stated that "[i]f 13 jurors did in fact render a verdict, defendant is entitled to a reversal." *Id.* In *People v McGee*, 247 Mich App 325, 334; 636 NW2d 531 (2001), lv gtd 467 Mich 915; 653 NW2d 779 (2002), this Court stated:

> The mere presence of the alternate juror during deliberations was not, in and of itself, a compelling circumstance that would deprive the defendant of a fair trial. *United States v Olano*, 507 US 725, 737; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Had the verdict been rendered by thirteen jurors, it is possible that the trial court would have been able to find manifest necessity justifying a mistrial. See *People v Sizemore*, 69 Mich App 672, 679; 245 NW2d 159 (1976). However, the court failed to conduct a hearing to determine whether the alternate juror participated in the deliberations . . . . Further, it is evident from the alternate juror's subsequent account of her role, or lack thereof, in the jury deliberations that a hearing would not have indicated the presence of manifest necessity.

In *Olano, supra* at 739, the United States Supreme Court, addressing a situation where two alternate jurors were purposely allowed to be present in the jury room during deliberations, stated:

> In theory, the presence of alternate jurors during jury deliberations might prejudice a defendant in two different ways: either because the alternates actually participated in the deliberations, verbally or through "body language"; or because the alternates' presence exerted a "chilling" effect on the regular jurors. Conversely, "if the alternate in fact abided by the court's instructions to remain orally silent and not to otherwise indicate his views or attitude . . . and if the presence of the alternate did not operate as a restraint upon the regular jurors' freedom of expression and action, we see little substantive difference between the presence of [the alternate] and the presence in the juryroom of an unexamined book which had not been admitted into evidence." [Citations omitted; omission and alteration in original.]

Here, we remand to the trial court for a hearing to determine whether the alternate juror actively participated and deliberated in the jury room with the other jurors and partook in the rendering of the verdict. The trial court is directed to set aside the conviction if it determines that the alternate juror actively participated and deliberated in the jury room. The trial court is to be guided by this opinion and the cases cited herein in making its rulings. If the trial court determines in fact that no prejudice occurred or that only twelve jurors rendered a verdict, defendant's conviction will be affirmed.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Kurtis T. Wilder